

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

BNSF RAILWAY COMPANY, )  
 )  
Plaintiff, )  
 ) Case No. 21 CV 3072  
-vs- )  
 ) Chicago, Illinois  
TOWN OF CICERO, ILLINOIS, ) November 10th, 2021  
 ) 4:40 p.m.  
Defendant. )

TRANSCRIPT OF PROCEEDINGS - Motion  
BEFORE THE HONORABLE STEVEN C. SEEGER

TELEPHONIC APPEARANCES:

For the Plaintiff: THOMPSON COBURN LLP  
BY: MR. RENATO T. MARIOTTI  
55 East Monroe Street  
37th Floor  
Chicago, IL 60603

For the Defendant: DEL GALDO LAW GROUP, LLC  
BY: MS. CYNTHIA S. GRANDFIELD  
1441 South Harlem Avenue  
Berwyn, IL 60402

Court Reporter: AMY M. SPEE, CSR, RPR, CRR  
Federal Official Court Reporter  
United States District Court  
219 South Dearborn Street, Room 2318A  
Chicago, IL 60604  
Telephone: (312) 818-6531  
amy\_spee@ilnd.uscourts.gov

1 (Proceedings heard via telephone:)

2 THE CLERK: 21 CV 3072, BNSF Railway Company versus  
3 Town of Cicero.

4 THE COURT: Good afternoon, everyone. It's  
5 Judge Seeger.

6 Let's get everyone's appearances on the record, if  
7 you would, please. Let's start with counsel for the  
8 plaintiff.

9 MR. MARIOTTI: Good afternoon, Your Honor.

10 Renato Mariotti, from Thompson Coburn, on behalf of  
11 the plaintiff, BNSF Railway Company.

12 My co-counsel, Ben Horwich, won't be able to be here  
13 because he's in transit today, but he has been on prior -- on  
14 our prior -- prior calls.

15 THE COURT: Yep. Got it. Okay. Good afternoon to  
16 you, Mr. Mariotti.

17 And, Defense Counsel, please.

18 MS. GRANDFIELD: Good afternoon, Your Honor.

19 This is Cynthia Grandfield on behalf of Defendant  
20 Town of Cicero. And it's just me today. My co-counsel is in  
21 a deposition.

22 THE COURT: Totally fine. All right. Good afternoon  
23 to you, Ms. Grandfield.

24 Well, thank you, everyone, for jumping on the call  
25 today. Let me start by apologizing for the delay today. I

1 know you folks had planned on having an earlier hearing with  
2 me today and had planned accordingly, and I pushed it back,  
3 and I was even a little late to join the pushback time.

4 By way of explanation but not excuse, I slotted you  
5 folks in today even though I -- for 3:30 even though I had a  
6 full calendar because I wanted to hear from you. And I had a  
7 sentencing that was earlier this afternoon. It went longer  
8 than I think anyone had expected. I sentenced someone to over  
9 a hundred months in federal prison for selling heroin, and  
10 it's not something I do lightly as a judge. It's something I  
11 put a lot of thought into.

12 And when I sentence someone to federal prison, my  
13 approach is, I've just got to get this right and it's going to  
14 take as much time as it takes.

15 So I'm sorry that you had to wait the time. If it's  
16 any small consolation, you know, when you sentence someone to  
17 months and months in prison, in federal court, that's a lot of  
18 time, too, right? So I appreciate the professionalism of  
19 everyone on the call here in this civil case and other civil  
20 cases for indulging me if I need to take whatever time is  
21 necessary before I deprive someone of their liberties. So  
22 thank you in advance for your -- not in advance. Thank you in  
23 retrospect here for your patience for the delayed time today.

24 MR. MARIOTTI: Not an issue, Your Honor. Thank you.

25 MS. GRANDFIELD: Yes, thank you.

1 THE COURT: And I know your time is valuable, and I  
2 never want to spend it. So thank you.

3 Folks, we are here for a hearing. I have looked at  
4 the docket. I'm obviously well familiar with the case from  
5 our preceding discussions a couple of months ago. You know, I  
6 remember the lay of the land, obviously, and I know that there  
7 was a -- the punch line is, there was a motion for a TRO and a  
8 preliminary injunction back in June. You folks hammered out a  
9 90-day stipulation to preserve the *status quo*. That expired,  
10 give or take, around October 26th, and the parties have not  
11 been able to agree on continuing the terms of that  
12 stipulation. So as BNSF sees it, we're back to square one.  
13 Everything has sprung back to life.

14 I want to talk to you folks about it. Before you get  
15 into any argument, though, I just want to make sure that I  
16 understand the lay of the land, meaning what the *status quo*  
17 is.

18 I'd like to hear from each of you first on what is  
19 the *status quo*? Is there currently a threat or a plan to cut  
20 off the water or impose a lien?

21 I want to hear from the town's counsel.

22 Ms. Grandfield, what is the town's plan -- so I  
23 usually hear from the movants first.

24 Mr. Mariotti, I'd like to hear from you. What is  
25 your understanding of the *status quo*.

1 MR. MARIOTTI: Well, we have offered to stipulate --  
2 extend the stipulation for any period of time that the town is  
3 willing to do that. And so we're willing to agree to, you  
4 know, extend it by a week, a month, a day, whatever they're  
5 willing to agree to, and they've refused to do so.

6 And so given that they threatened to tear up the  
7 pipes and shut off our water and evict us from the property  
8 beforehand and on -- literally less than 24 hours before a  
9 hearing was scheduled changed their mind, and we were able to  
10 enter a stipulation. And they're not willing to agree to  
11 extend it. As far as we're concerned, those threats are back  
12 in force.

13 Now, I understand that Cicero is saying now that, for  
14 example, they may -- they will -- they may take their time or  
15 that the prior notices may not have been enough. From our  
16 vantage point, it's being a little too cute.

17 I mean, if they aren't -- if they don't actually  
18 intend to do any of these things, then why don't they just  
19 enter the stipulation -- or extend the stipulation?

20 THE COURT: Okay. Well, Ms. Grandfield, I want to  
21 hear from you. I'll tell you, that last point seems to be the  
22 right one to me. If you're not threatening to do anything,  
23 why not agree to a stipulation?

24 MS. GRANDFIELD: So we are -- the reason that we're  
25 not agreeing to a stipulation is that that also includes terms

1 of payment and accrual of a late fee. So it will relatively  
2 ensure that the town will not get any payment of any fee at  
3 all. Because since we've entered into the stipulation, we've  
4 received, of course, no fees from BNSF because, you know, that  
5 was what the stipulation said.

6 So --

7 THE COURT: Can I stop you on that, Ms. Grandfield?  
8 I'm sorry to interrupt you.

9 So do you mean that you have not gotten even the  
10 smaller original amount?

11 MS. GRANDFIELD: Correct.

12 THE COURT: Well, what about that, Mr. Mariotti?

13 The amount before was a certain number of dollars.  
14 And they wanted to raise it to -- I think it was, what, give  
15 or take \$6,000 a month, and they wanted to increase it to  
16 about 90,000 a month, give or take.

17 Do you know, is BNSF paying anything for water right  
18 now? And if so, what is it?

19 MR. MARIOTTI: Yeah, my understanding is that we were  
20 paying the prior bill of \$6,643 a month. So as far as I know,  
21 we are paying that amount, and we have -- we would agree to  
22 stipulate to pay that amount.

23 Regarding an accrual of a late fee, they were  
24 charging us an accrual of a late fee of \$18,060 a month, and  
25 obviously that would itself be irreparable harm given that

1     there is no refund process --

2             THE COURT: Right.

3             MR. MARIOTTI: -- in place.

4             THE COURT: Let's put aside the refund -- or -- I'm  
5     sorry -- the late fee for a second.

6             Ms. Grandfield, he's telling me that you're getting  
7     over \$6,000 a month. Do you know for certain that's  
8     incorrect?

9             MS. GRANDFIELD: I will tell you -- what the water  
10    director told me is -- his exact quote was, "We're not getting  
11    nothin' from them." So --

12            THE COURT: We're not -- we're not getting nothing.  
13    I mean, I find it hard to believe that BNSF is getting free  
14    water from the town.

15            MS. GRANDFIELD: I should -- I wanted to clarify  
16    that. It's sewer. It's the sewer fees. They're -- they're  
17    paying their water bill. And we would not be shutting off  
18    their water. It's the sewer, which is a separate fee.

19            THE COURT: All right. So let's break this down for  
20    a second.

21            So the -- well, whether I call it water or sewer, I  
22    mean -- you know, sewer is water-related, right? So the  
23    motion talked about BNSF's sewer bills -- which sometimes I  
24    just call water, but maybe I should call it sewer -- to  
25    increase from \$6,643 a month to \$90,300 a month.

1           So my question to you is: Is BNSF currently paying  
2 sewer bills of \$6,643 a month to the Town of Cicero?

3           MS. GRANDFIELD: My understanding based on hearing  
4 from the water director is no, but I did not visually view  
5 their system to confirm that.

6           THE COURT: Okay.

7           MR. MARIOTTI: And, Judge, I just will say that I --  
8 and, in fact, I have -- you know, my -- I just confirmed with  
9 my client that our understanding is that we are continuing to  
10 pay the original amount monthly. So we'll confirm that, but  
11 we absolutely should be paying that original amount, and that  
12 is our intention, and we believe we are.

13           THE COURT: And the stipulation is on file, right?  
14 The stipulation is Docket No. 39. I'm clicking on it here.  
15 The stipulation covers enforcing the sewer rate charge and  
16 late fees. It doesn't say you're entitled to free water and  
17 sewer, right?

18           So I guess I would be surprised if BNSF thinks it's  
19 getting free sewer stuff. And I am surprised to hear that  
20 now. And I guess my inclination is to think that I should  
21 operate under the assumption that they're not getting free  
22 sewer.

23           You know, if you want to submit a declaration from  
24 this, Ms. Grandfield, I will certainly listen to you. If  
25 you're getting totally stiffed by the railroad and they aren't



1 paying anything for sewer, zero dollars, give me a  
2 declaration. I'll look at it, and I'll deal with it. I don't  
3 think that's consistent with what I'm hearing from the  
4 railroad and that's not consistent with what I'm expecting  
5 them to do.

6 I never thought they were saying they should pay you  
7 nothing. I thought the argument was always they shouldn't  
8 have to pay you more.

9 MR. MARIOTTI: That is our argument, Your Honor, just  
10 to be crystal clear.

11 THE COURT: Yep. Right.

12 MS. GRANDFIELD: Well -- yeah, and that's fine, but I  
13 have also heard arguments that they should be only paying like  
14 \$150 a month. So -- but either way, I -- like I said, that's  
15 what the town water director told me, but I did not view it,  
16 so I will have to, you know, check with him and make sure  
17 that, you know, I get whatever that documentation is because I  
18 don't want --

19 THE COURT: Okay.

20 MS. GRANDFIELD: -- to misrepresent it, you know.

21 THE COURT: Here's what I'd like you to do, because  
22 this is an important point, by Friday I'd like you to put  
23 something on file that confirms whether BNSF is paying you for  
24 sewer this year and how much it is per month.

25 MS. GRANDFIELD: Okay.

1 THE COURT: And maybe you could work cooperatively  
2 with Mr. Mariotti.

3 I'd like you to check with your client, too, and  
4 hopefully you folks can -- you should be able to do it in one  
5 paragraph. Just say, the parties have looked at their books  
6 and confirmed that BNSF has paid X dollars per month to the  
7 town for sewer. Right? It should be a sentence or two.

8 MS. GRANDFIELD: Yeah.

9 MR. MARIOTTI: We will.

10 THE COURT: That way we've got a clean record.

11 Okay. So for purposes of the discussion here, folks,  
12 let's operate under the assumption that the railroad is  
13 continuing to pay at the prelawsuit rate, the \$6,500 and some  
14 change here, give or take, okay?

15 So, Ms. Grandfield, take it from there. What's your  
16 understanding of the lay of the land? Assuming that's  
17 correct, what's your understanding of the *status quo*?

18 MS. GRANDFIELD: So the rest of my understanding is,  
19 so far as the notice of shutoff, that that would -- regardless  
20 of whether they simply have a bill outstanding, which is under  
21 the current ordinance that they recently passed with the  
22 increased rate, that that would have to be reissued because of  
23 the stipulation. I mean, there's basically no precedent for  
24 this.

25 So considering the, you know, admittedly extreme

1 nature of the enforcement, they would have to reissue that.  
2 And I don't believe they have plans to do that currently  
3 because of the logistical issues involved with shutting off  
4 someone's sewer. I mean, it's not like shutting off someone's  
5 water where they can just --

6 THE COURT: Why would they have to reissue the  
7 ordinance? I mean, the -- I think of it like a legislative  
8 capacity and an executive capacity. I understood the  
9 stipulation basically to be an agreement that they wouldn't  
10 enforce an ordinance that's on the books.

11 I thought you had filed something saying they had not  
12 vacated the ordinance.

13 MS. GRANDFIELD: Right, they have not vacated the  
14 ordinance.

15 THE COURT: Right.

16 MS. GRANDFIELD: The ordinance --

17 THE COURT: So it's on the --

18 MS. GRANDFIELD: -- still exists.

19 THE COURT: -- books -- right. So it's on the books,  
20 and it's not currently being enforced. And I hear the  
21 railroad's lawyer saying, look, they're nervous given the  
22 overt threats from the town before that were held in abeyance  
23 for purposes of 90 days and 90 days only. Those threats have  
24 now effectively come back to life because you've got an  
25 ordinance on the books that has been used by the town before

1 to threaten them. What's wrong with that argument?

2 MS. GRANDFIELD: That argument -- the only thing  
3 that's wrong with that argument is that they would still have  
4 to reissue the notice of shutoff and -- so that would take  
5 additional time, and they would have to choose that  
6 enforcement method. So there's no imminent threat because  
7 they haven't issued the shutoff notice.

8 THE COURT: I guess here's -- here's -- here's what I  
9 don't understand: We had a stipulation for 90 days where they  
10 wouldn't enforce it. I don't understand why the town would  
11 refuse to continue the stipulation unless it had an intention  
12 to enforce the ordinance.

13 If the town had no intention of enforcing the  
14 ordinance, why not agree to the stipulation?

15 MS. GRANDFIELD: I think the town at this point does  
16 have an intention to enforce the ordinance in the sense of  
17 getting payment because they don't want to agree to the  
18 extension. So --

19 THE COURT: Okay. And -- thank you for that.

20 MS. GRANDFIELD: Correct. Yes.

21 THE COURT: Right. So your understanding is that the  
22 town is currently intending to enforce the ordinance against  
23 BNSF?

24 MS. GRANDFIELD: Yes, it's my understanding that they  
25 will start again issuing bills to BNSF and seeking payment on

1 those bills, which was part of the stipulation.

2 THE COURT: Right.

3 MS. GRANDFIELD: And then to the extent they're not  
4 paid, issuing a late fee.

5 Now, I have advised them that I don't think they can  
6 start doing that until December 1st because that's when they  
7 start -- because they issue a bill at the beginning of the  
8 month. So I don't -- you know, it's kind of a gray area with  
9 the stipulation ending at the end of October. I don't really  
10 know how they could, you know, start doing that again.

11 So -- but, yeah, that's -- that's my understanding.

12 THE COURT: And is the bill, I assume, going to be  
13 retrospective till October 26th at the increased rate?

14 MS. GRANDFIELD: Yes.

15 THE COURT: Okay. So as of today, your position is,  
16 the increased rate applies to BNSF Railway?

17 MS. GRANDFIELD: Correct.

18 THE COURT: Okay. Do you know any more granularity  
19 about how soon the town is going to start enforcement  
20 mechanisms?

21 In other words, are they going to send a letter? Are  
22 they going to send a notice of shutoff? Are they going to try  
23 to impose a lien? Anything like that? What's the plan?

24 MS. GRANDFIELD: So their enforcement progression  
25 plan, which they would just restart again, is generally that

1 they -- you know, they disburse -- importantly, issue a bill.  
2 And then if the bill isn't paid, then they start imposing late  
3 fees.

4 I think in this instance, they would consider placing  
5 a lien if it still wasn't paid after a set period of time.  
6 But that would not start until -- the progression would not  
7 start until December 1st.

8 THE COURT: Okay.

9 MS. GRANDFIELD: Or whatever day that -- weekday that  
10 is that's closest to it. I --

11 THE COURT: Right.

12 MS. GRANDFIELD: -- should have looked at the  
13 calendar.

14 THE COURT: But, again, your perspective is that the  
15 meter is -- the higher rate is currently running?

16 MS. GRANDFIELD: Correct.

17 THE COURT: Right. Okay. Okay. So it seems pretty  
18 clear to me we've got a live issue.

19 So, Mr. Mariotti, why do you think I ought to enter  
20 the TRO?

21 MR. MARIOTTI: Well, as a starting point, because the  
22 meter is already running and we're already accruing a late  
23 fee, and the Town of Cicero has no refund mechanism, BNSF is  
24 already being harmed. So as of this moment, BNSF is already  
25 accruing a fee and is going to have to pay, let's say, a fee

1 that it is not going to be able to get back as a result of an  
2 unlawful ordinance, an ordinance that I think is -- on its  
3 face is unconstitu- -- or -- excuse me -- it violates the 4-R  
4 Act and ICCTA -- and/or ICCTA.

5 Separate and apart from that, you know, we haven't  
6 been able to get a clear sign here in terms of what exactly  
7 this means in terms of -- and we've heard here an enforcement  
8 framework. It wasn't followed before, you know, before we got  
9 here. In fact, it escalated very quickly to threats of  
10 shutoff, threats of pipes that were going to be dug up and so  
11 forth.

12 And this is a very important interstate  
13 transportation hub where -- you know, we all hear things on  
14 the news about supply chain issues. Here, this is a hub where  
15 there are a lot of people that are counting on these trains to  
16 enter and leave the station, so to speak, and get to their  
17 destination. There is a lot of money at risk. There is also  
18 a lot of people's jobs and livelihoods at risk.

19 So this is the sort of thing where essentially she's  
20 suggesting there may be a lien, which would put us potentially  
21 in state court, or potentially they could -- you know, they  
22 could -- we could be back here again with a threatened  
23 enforcement action in the not too distant future when we have  
24 a briefing, frankly, that is almost done that would resolve  
25 this issue.

1           So it appears to me it's -- that -- particularly when  
2 you consider the totality of their conduct in this case, that  
3 there -- that a PI motion should be issued -- should be  
4 granted in this -- in this instance.

5           THE COURT: Okay. Thank you.

6           Ms. Grandfield, why shouldn't I issue a TRO?

7           MS. GRANDFIELD: So I would say that the reason that  
8 you shouldn't issue a TRO in this case is because there isn't  
9 irreparable harm that's not monetary. I believe that anything  
10 that they would pay that would be later deemed unlawful could  
11 be either directly refunded or assessed as damages or could  
12 be, I don't know, taken off their ultimate bill.

13           They --

14           THE COURT: Well, can I stop you on that? What's the  
15 mechanism for getting the money back? I mean, suppose they  
16 pay for two years, and then, you know, somebody says down the  
17 road they shouldn't have had to pay, how are they going to get  
18 their money back?

19           MS. GRANDFIELD: Well, presumably if the Court were  
20 to enter an order that it was unlawful, then we would have to  
21 just refund the amount of the -- whatever the overpayment was  
22 or work out some sort of plan with them where, you know, their  
23 bill was lessened over time.

24           THE COURT: So you're saying hypothetically that this  
25 Court could enter a judgment in the meantime -- I'm sorry --



1 could enter a judgment, and they could recover it that way?

2 MS. GRANDFIELD: Yes. And I don't -- and so far as  
3 their way of getting the money back, I mean, the town is one  
4 of the oldest municipal corporations in the state. We have an  
5 obligation to do cross-payment for a variety of things. And I  
6 think our last budget was a hundred million dollars. So I  
7 mean -- you know, I don't understand -- I don't really follow  
8 that argument, but -- so I think that that would be the  
9 remedy. If the ordinance is ultimately found unlawful, then  
10 we would have to return any funds that the town wrongly  
11 received or, like I said, in the alternative, work out some  
12 sort of plan, you know, whatever -- whatever makes the most  
13 sense.

14 THE COURT: Do you want to speak to that,  
15 Mr. Mariotti, about the ability to get the funds back?

16 MR. MARIOTTI: Sure.

17 I inquired regarding a refund mechanism before we  
18 filed the initial complaint, and the responses I got was a  
19 threat to tear up the pipes. I did not receive any -- this is  
20 the first I've heard about any potential for a refund  
21 mechanism here.

22 We would feel more comfortable if there -- if the  
23 Court thought that payments at a higher amount were necessary  
24 here, that they go into an escrow account controlled by the  
25 Court, given the circumstances.

1           THE COURT: I mean, I can certainly see why it might  
2 give people pause about the collectability of something from a  
3 municipality. I'm seeing a lot of red tape, a lot of  
4 bureaucracy, a lot of challenges. It doesn't seem easy to me.  
5 It's not like an ATM. It's probably the opposite.

6           Go ahead, Ms. Grandfield.

7           MS. GRANDFIELD: Yeah, I would just say that -- like  
8 I said, we are -- we would be able to pay it back. The town  
9 has a -- in addition to their water/sewer fund, they have an  
10 additional litigation fund or lawsuit fund that they would tap  
11 into if necessary. So I think that that could be resolved.

12           And -- I mean, I guess I would just also say that if  
13 this ordinance is struck down, I -- you know, I do -- the town  
14 does believe that BNSF should be paying a higher rate. Now,  
15 how that's calculated out if another ordinance is passed, at  
16 this point it's unknown, but -- so that might affect it as  
17 well, and that's why I was leaving the other option of, you  
18 know, refunding it over time depending on what happens,  
19 basically, with everything.

20           THE COURT: And, Ms. Grandfield, you were speaking  
21 more generally on your argument against the TRO when I jumped  
22 in. I want to give you an opportunity to say whatever you  
23 want to say generally. I think you were addressing my  
24 question.

25           But to go back to my broader question, why shouldn't

1 I issue the TRO?

2 MS. GRANDFIELD: So the reason you shouldn't issue  
3 the TRO is that, first, like I said, there is no irreparable  
4 harm in that there's nothing that's equitable harm that can't  
5 be addressed with damages or with money.

6 Second, the reason I would say that there should not  
7 be a TRO issued is pursuant to -- the plaintiff brings his TRO  
8 pursuant to Counts I and II, which are the ICCTA (inaudible)  
9 the 4-R Act. I would say that under the --

10 THE COURT REPORTER: Counsel, can you repeat that?

11 MS. GRANDFIELD: Sure.

12 THE COURT REPORTER: And if you are on speakerphone,  
13 can you please get yourself off speaker?

14 MS. GRANDFIELD: Yes. I'm sorry. I was. You caught  
15 me. I should have not been doing that, especially while I was  
16 pacing.

17 That attorney -- that BNSF brings this motion  
18 pursuant to two counts. The first count is the ICCTA count,  
19 and the second count is the 4-R Act.

20 Under the ICCTA, I would argue that for purposes of  
21 likelihood of success on the merits, it is not a regulation of  
22 rail transportation. Instead, it's an assessment of a sewer  
23 fee, and any affect on rail transportation would be remote or  
24 incidental. And it's a sewer fee that while BNSF disputes  
25 it's being charged more, it's being assessed against

1 everybody.

2 With respect to the 4-R Act, I would again argue that  
3 there's not a -- the standard for likelihood of success on the  
4 merits has been met in that instance either. Because this fee  
5 that the town is collecting is a fee which is in fact a fee  
6 and not a tax within the meaning of the 4-R Act in that it's  
7 assessed for the purposes of utilizing a system and a service  
8 specific to the town.

9 So --

10 THE COURT: I'm sorry, Ms. Grandfield. Can you hear  
11 me okay?

12 MS. GRANDFIELD: Yes, I can.

13 THE COURT: I have to apologize to you. When my  
14 court reporter said that you needed to speak up and get off  
15 speakerphone, I then proceeded to bump my phone, and I  
16 accidentally hit the button that dropped the call. So I just  
17 had to call back in. So I'm having a bad display here. I  
18 both had a late arrival and an early departure. I  
19 inadvertently left the call, and you undoubtedly were saying  
20 something thoughtful, none of which I heard.

21 So if you'd be kind enough, Ms. Grandfield, take it  
22 from the top from when my court reporter asked you to -- and  
23 I'll look back at the transcript later. But if you can go  
24 back and just rewind the tape for maybe 45 seconds. Start  
25 from there, please. And I'm sorry about that. I don't mean

1 to -- take your time. Go ahead.

2 MS. GRANDFIELD: No, no problem. It was a stirring  
3 argument. I'm sure Mr. Mariotti would agree.

4 So my argument would additionally be that there is  
5 not a likelihood of success on the merits because they have  
6 not made out a claim under ICCTA because this was not a  
7 regulation of rail transportation in any form; it is a --  
8 simply an assessment of a sewer fee. While they may dispute  
9 that it's an assessment -- that it is a -- too high of a fee  
10 or an appropriate fee, at the end of the day, it's not a  
11 regulation of rail transportation. So because of that, they  
12 haven't passed step one and can't go to step two as if it's  
13 too high and if it's too high in comparison with respect to  
14 other entities.

15 Secondly, there is the lack of likelihood of success  
16 on the merits with respect to the 4-R Act because, under the  
17 case law, which I have cited to briefly in my response and  
18 then more -- in more detail in my motion to dismiss, the town  
19 believes that this is a fee and not a tax because it's a fee  
20 that's being assessed for the use of the town's sewer system  
21 and sewer service.

22 And because of that, again, the -- you can't go  
23 further into the analysis as to whether the fee is  
24 discriminatory or not because you have not met step one, which  
25 is, it's not a tax within the meaning of the 4-R Act, so,

1     thus, it does not fall with it.

2             Lastly, I would say with respect to the balancing of  
3     the equities that to the extent that's at all applicable or  
4     relevant to the Court's consideration, that the town is an  
5     economically disadvantaged suburb. They are currently running  
6     the sewer fund at -- based on the last audit that was  
7     completed, a \$1.2 million deficit. And that fund is the only  
8     fund that they are able to use this for. So they simply need  
9     the money. And it is clear that BNSF does have the ability to  
10    pay, so we're not looking at some sort of situation like I  
11    think was raised in some dormant commerce clause cases where  
12    you had small business owners that were unable to -- that it  
13    turned into an equitable remedy because they were unable to  
14    pay the fee because it would basically cost them to have to  
15    close up shop and not be able to run the business anymore.

16            THE COURT: Can I say -- and I appreciate that. I  
17    will tell you, I did not understand that argument in your  
18    brief. It seemed to be saying we need the money and they have  
19    it, so we can take it. You know, and this is not a criminal  
20    situation, but I think about this in the criminal context. It  
21    would never be okay to say, look, I need the money, you've got  
22    it, I can take it.

23            It seems funny to me to say, I could potentially do a  
24    discriminatory tax against a railroad because they've got the  
25    money and we need money, we're running a shortfall here. Why

1     should that matter to me at all?

2                 MS. GRANDFIELD: I think it should -- I think it  
3     should matter because the town still has a deficit. And I  
4     think even if the fee that is assessed is a greater fee than  
5     the Court deems appropriate, I think that BNSF should be  
6     liable for a higher fee, even if it's not \$90,000, based on  
7     the lay of their land and that they have approximately  
8     250 acres of land. They have large amounts of -- I always get  
9     it confused, but impermeable or impervious surfaces which  
10    causes a lot of stormwater drainage into the town. So their  
11    usage is high.

12                And so it's not a case "you've got it, we should take  
13    it"; it's a case that -- ultimately it's a question of math.  
14    Is BNSF liable for a higher fee? I believe yes, yes, they are  
15    on the objective evidence.

16                Is -- are they liable for \$90,000 and then being  
17    placed in a separate category? That's really the question  
18    before this Court. But I do believe from an equitable  
19    standpoint that they are liable for a higher fee, because  
20    prior to this, just, you know, rough back-of-the-napkin math,  
21    they were paying approximately 1.5 percent of the total  
22    collections for the sewer fee. And at this current rate, they  
23    would be paying 15 percent. Even just doing a direct  
24    dollars-to-dollars calculations of their -- the percentage of  
25    land owned in the Town of Cicero, that would be approximately

1 7 percent, so that's about \$450,000 a year.

2 So that doesn't even -- and that doesn't even account  
3 for the fact that, again, their usage is higher because they  
4 don't have drainage on that site and they have a lot of  
5 blacktop paving, *et cetera*.

6 THE COURT: Okay. There is a lot there. I  
7 appreciate that.

8 Tell me how the sewer usage is correlated to acreage.

9 MS. GRANDFIELD: So the -- you mean like -- you mean  
10 how they calculated the current fee?

11 THE COURT: Well, like more land equals more sewer  
12 usage. What's the relationship?

13 MS. GRANDFIELD: Oh, yes. Yes. So more land equals  
14 more sewer usage because the -- as I said before, the town  
15 system is a -- which I'm sure nobody remembers because it's  
16 not an exciting topic, but the town system is a combined sewer  
17 and stormwater system because of its age. So it's not just  
18 stuff that, you know, goes down the drain when someone flushes  
19 the toilet at BNSF; it's also any sort of stormwater runoff.

20 And so if there is a higher level of stormwater  
21 runoff, which there is based on increased pavement, then that  
22 results in a higher usage of the property.

23 So I'm basing that cal- -- of the system -- excuse  
24 me. So I'm basing that calculation based on the fact that,  
25 okay, they own 7 percent of the land. The coefficient for



1 runoff on something that's asphalt, for example, is very low.  
2 It's -- I think it's like 5 or 10 percent.

3 But the coefficient of runoff for something that is  
4 on -- excuse me -- I said "asphalt" -- on something like  
5 gravel or soil. You know, if you go and look at your house  
6 and it's raining outside, you see wet soil. But if there is a  
7 lot of rain, you see it start running off the blacktop or the  
8 sidewalk. So that coefficient is nearly four times the rate.

9 So if you don't have some sort of detention or other  
10 sort of drainage on the site, then all of that extra water is  
11 running off your blacktop and concrete and going directly into  
12 the town's system, which means a higher usage because we've  
13 got more water going into the town system directly as opposed  
14 to seeping into the ground.

15 THE COURT: Okay. How much is the shortfall in the  
16 budget right now?

17 MS. GRANDFIELD: 1.2 million.

18 THE COURT: Why would I be wrong in assuming the  
19 following: Somebody at this town said, gee, we've got  
20 basically a million dollar shortfall, why don't we increase  
21 BNSF's fees to 90 grand a month? 12 months, that's a million  
22 bucks. We'll just get -- we'll make BNSF pay for it. Problem  
23 solved. Why shouldn't I assume that's what's going on here?

24 MS. GRANDFIELD: That's not what's going on here  
25 because BNSF's rate was always assessed on an acreage basis

1 since approximately the '50s. Around the time that they  
2 enacted the other category for the commercial industrial  
3 property that is outside the town's limits, which is the same  
4 rate per acre, they also looked at BNSF's rate and determined  
5 that that rate needed to be raised as well and was a lower  
6 rate than was appropriate.

7 THE COURT: Well, let me -- so let me put it to you  
8 this way --

9 MS. GRANDFIELD: Sure.

10 THE COURT: -- the ordinance is proposing to go from  
11 \$6,643 a month to \$90,300 a month, according to the brief.

12 MS. GRANDFIELD: Right.

13 THE COURT: When I do the math, I calculate that's  
14 basically a 13 and a half times increase. In other words,  
15 you're proposing to increase the fee by orders of magnitude 13  
16 and a half times the amount.

17 And I will say, for any of us in any part of life, if  
18 your home water bill went up by that much, if your credit card  
19 bill went up by that much, if your taxes went up by that much,  
20 if your parking fees, if your, you know, Secretary of State  
21 license plate, any of that, if any of our fees went up by 13  
22 and a half times, that would raise a lot of red flags, and I  
23 think potentially it may not pass the straight face test.

24 Why shouldn't I infer from the boldness of the  
25 increase that it's not actually correlated to a need for

1 appropriate compensation for usage but, rather, it is trying  
2 to just get money out of the railroad because they've got it  
3 and you need it?

4 MS. GRANDFIELD: Because it's also something that was  
5 always assessed by the town, and it was assessed with  
6 respect -- as an acreage basis. And it's a case that the town  
7 doesn't necessarily review everything annually and discovered  
8 that they believed that BNSF has been underpaying for a  
9 significant amount of time.

10 So the -- I guess the flip side to that, to what the  
11 Court has said, is that if BNSF has been underpaying, does  
12 that mean that the town can never increase its fee a  
13 substantial amount just because, well, that's what the rate  
14 was before?

15 THE COURT: I hear you.

16 MS. GRANDFIELD: So --

17 THE COURT: Let me ask you, whose idea was it  
18 (indiscernible)?

19 THE COURT REPORTER: Judge, I'm having a hard time  
20 hearing you.

21 THE COURT: Whose idea was it to increase the fees  
22 from \$6,000 a month to \$90,000 a month?

23 MS. GRANDFIELD: It was -- well, the ordinance was  
24 passed by the town board, of course, and it was reevaluated  
25 after they passed the other one -- I forget how many months --

1 four -- by --

2 THE COURT: I'm sorry. Rewind the tape. And I know  
3 it was passed by the -- by the board. I want to know whose  
4 idea was it. Who said to the board, hey, we ought to increase  
5 the fees for BNSF, and we ought to do it by, you know,  
6 increasing it 13 and a half times, we ought to go to \$90,000 a  
7 month? Whose idea was that?

8 MS. GRANDFIELD: I believe it was the water  
9 director's idea along with taking the calculations of the town  
10 engineer for the previous ordinance. And the standard  
11 practice in the town is that then an ordinance is drafted by  
12 the town attorney, not me specifically -- or not me at all,  
13 and then the ordinance is put on the agenda, and then the  
14 agenda is gone over with by the town attorney, again, not me,  
15 with the town president, and then it's presented.

16 THE COURT: And how did you get to that number,  
17 \$90,300 a month?

18 MS. GRANDFIELD: So how the town board got to the --  
19 or how the town got -- sorry, I'm used to saying town board.

20 How the town got to that number was the -- excuse me.  
21 So the town engineer had previously calculated an amount for  
22 the other commercial and industrial property outside the town  
23 limit, which was also assessed at the same rate of \$350 an  
24 acre. He did that by looking at old sewer atlases and how  
25 much the City of Chicago charged per connection, and he came

1 up with approximately \$300, and then the town and its board in  
2 its discretion raised that to 350.

3 After that, they looked at the railroad rate because  
4 that had also -- because that was at a much lower rate. It  
5 was at \$25, I think, beforehand per acre. And they just  
6 correlated it with the -- the other commercial industrial  
7 property that they assessed the \$350 an acre and deemed it  
8 about similar. And so that's the rate they imposed for rail  
9 yards as well.

10 And then I will say, in addition to that, the town  
11 has said that they are -- they were also concerned about --  
12 and I understand -- I'm not trying to throw in things that the  
13 Court doesn't think is relevant, but the town was concerned  
14 about the flooding that was going on that they felt was being  
15 caused by BNSF and the fact that they were being charged a low  
16 rate for what they felt was high usage.

17 THE COURT: Got it.

18 And I will say, I was not sure that I was following  
19 the point in the brief about the railroad not settling the  
20 runoff case. I mean, you know, there are two lawsuits here.  
21 There is the one that BNSF filed about the sewer usage, and  
22 then you all folks -- you folks filed a separate lawsuit in  
23 state court that was removed and then reassigned to me about  
24 water runoff. And, frankly, it seemed to me like you were  
25 saying we're not going to stipulate to an extension of this

1 because they're not settling the runoff case. And I'm not  
2 sure why those two should be linked at all.

3 Go ahead.

4 MS. GRANDFIELD: So the town thinks that the other  
5 one is related because that affects their usage and what they  
6 should be charged. And it also affects that part of -- the  
7 reason that they passed this and wanted to enforce this so  
8 much is they do feel that BNSF's in particular usage is high  
9 and that they're causing more than the system can bear.

10 And the way I see them related, and I think the way  
11 the town sees them related, is that if they are -- if there is  
12 some relief so far as some sort of agreed remediation in that  
13 case, then that would, I would presume, affect the usage if  
14 they, for example, put in some sort of drainage. I'm not  
15 saying what that specifically would be.

16 So that might -- that would help to settle what sort  
17 of fees should be charged and how much should be charged. So  
18 the town's primary concern is the flooding that they believe  
19 is being caused by BNSF.

20 Their secondary, but still obviously important or  
21 they wouldn't have refused to extend the stay, is that they  
22 get a sewer fee from BNSF that covers their costs and that  
23 they feel is appropriate based on BNSF's usage.

24 THE COURT: Can I ask you another thing, by the way,  
25 about the -- getting the money back point and irreparable

1 injury? I understood you to say that the sewer fund is in a  
2 hole. No pun intended. It's running a deficit of a million  
3 and a half a year.

4 How could BNSF be confident that they're going to get  
5 their money back if they're dealing with a municipality with a  
6 sewer budget deficit in an area in question?

7 MS. GRANDFIELD: I believe that the town would have  
8 to pull money from other funds to pay that back. And they  
9 have additional funds --

10 THE COURT: Do they have it, though? I mean . . .

11 MS. GRANDFIELD: Yes, they have additional funds,  
12 including, like I said, a large litigation fund that is, I  
13 believe, several million dollars. I'd have to check the  
14 budget. But they have a large fund for that because the town,  
15 given its size, is largely self-insured. In other words,  
16 nothing kicks in insurance-wise until like, you know, a  
17 million bucks.

18 THE COURT: But you could probably use that money for  
19 other things. I'm going to go out on a limb and guess the  
20 Town of Cicero doesn't have a bunch of money lying around, you  
21 know.

22 MS. GRANDFIELD: I mean, they --

23 THE COURT: I'll take the silence as a deafening  
24 stipulation to that effect.

25 MS. GRANDFIELD: I mean, I'm never going to say that

1 the Town of Cicero has a bunch of money laying around. That  
2 has so many implications. But --

3 THE COURT: Here's the -- and I make light of it for  
4 humor value there, but it does seem to me that there is a  
5 legitimate concern about the ability to get the money back  
6 from the municipality. Go ahead.

7 MS. GRANDFIELD: Yeah, so I would never say that.  
8 However, there are statutes that I believe would apply, such  
9 as the Local Government Prompt Payment Act, that would require  
10 the town to pay it back, whether it does or not. So that  
11 would take a priority.

12 So even in instances where -- you know, I've had  
13 cases that are wrongful conviction and they had to pay an  
14 extra million bucks out of it because they had less insurance  
15 at the time, blah-blah-blah. And, you know, they just have to  
16 move funds away and move funds around and be able to do that.  
17 So there's not really an option of nonpayment.

18 THE COURT: Okay. Go ahead.

19 MS. GRANDFIELD: I was going to say, does it mean  
20 that they're going to have less money for other things or, you  
21 know, that sort of thing? Yes, but it doesn't mean that  
22 they're not going to be able to somehow pay the money back. I  
23 can't think of -- I've represented the town for about 12 years  
24 now, and I can't think of a single time, even when they had  
25 various judgments entered against them that were rather large,



1 that they have not been able to pay back the funds, even  
2 accounting for the fact that of course, as everybody knows,  
3 their former town president stole \$12 million from their  
4 pension fund.

5 THE COURT: Yeah. Okay. Is there anything else you  
6 would like to say, Ms. Grandfield, about the TRO request  
7 before I turn the floor back to Mr. Mariotti?

8 I always give the movant the first and the last word.  
9 So go ahead. If there's anything else you want to say, I'll  
10 listen to you.

11 MS. GRANDFIELD: There is nothing else that I want to  
12 say. I think I've rambled on enough, and --

13 THE COURT: No, no.

14 MS. GRANDFIELD: -- thank you for the Court's  
15 patience.

16 THE COURT: You've answered my questions, so I  
17 appreciate you doing that.

18 Mr. Mariotti, anything else you'd like to say?

19 MR. MARIOTTI: Yeah, a few things, Judge.

20 One thing I want to make clear is that if -- you  
21 know, there was a lot of discussion about, for example, the  
22 size of BNSF's facility and the fact that it's got paved  
23 surface and so forth. But there are not -- other industrial  
24 users within the Town Cicero are not charged on this basis.

25 If, for example, the Amazon distribution center or

1 the shopping malls and other large parcels of land that were  
2 paved were charged -- you know, were on the same rate, they  
3 would -- you know, that would be a dramatic increase for them.  
4 And if BNSF was charged based on the usual industrial  
5 commercial rate, we'd be paying about \$150 a month as opposed  
6 to, you know, 6600 or 90-something thousand.

7           So it just is -- at a baseline, this is an ordinance  
8 that discriminates against railway. And it -- I understand  
9 that there is a need for additional funds, but just to be  
10 crystal clear -- and I understand that there's -- there's been  
11 some statements that have been made about costs. But when we  
12 went to actual depositions -- and this is before Your Honor in  
13 our initial reply in support of our motion for a TRO -- when I  
14 deposed the individuals who actually calculated this rate,  
15 this \$350-per-acre figure was a town -- the town engineer  
16 looking at the bills that Cicero was receiving from Chicago,  
17 ballparking a figure from that that the town changed. They  
18 didn't consider -- and they don't even know the cost to  
19 provide sewer service to BNSF, the amount of runoff, the  
20 amount of pavement.

21           All of the discussion here is hypothetical because  
22 none of that actually went into the -- to the ordinance. And  
23 so really I -- this is really about a discriminatory ordinance  
24 and the impact that it's -- that it is placing on an  
25 interstate rail facility.

1 THE COURT: Okay. Anything else from you,  
2 Ms. Grandfield, on that point?

3 MS. GRANDFIELD: I just want to reiterate my point  
4 before that you don't get to the point of discrimination  
5 without bringing it within the provisions of the act, which  
6 are -- again, it's not a regulation of rail transportation and  
7 it's not a tax within the meaning of the 4-R Act.

8 And I also want to say that with respect to the  
9 method of calculation, that it does not have to be a precise  
10 dollar-for-dollar calculation. There is no mathematical  
11 equation required.

12 And then lastly, with respect to the point of the  
13 coefficient, that is not hypothetical or unknown. Our town  
14 engineer was able to view that and was able to determine that  
15 there is a substantial portion of paving on the BNSF site.  
16 There appears to be a lack of drainage. There -- you know,  
17 there's no detention ponds on there, something you can easily  
18 visualize. And the coefficient is something that was -- that  
19 I was referring to earlier is something that was  
20 mathematically determined by the Metropolitan Water  
21 Reclamation District in about 2014. So that is an absolute --  
22 well, maybe it's not absolute. I'm not an engineer. But that  
23 is -- does have a foundation and a basis.

24 THE COURT: Okay. Mr. Mariotti, last word.

25 MR. MARIOTTI: All right. Just regarding this

1 regulation issue, it does seem to me that the Town of Cicero  
2 does want to regulate BNSF. They have threatened to kick them  
3 out of their own intermodal railroad facility because they're  
4 not willing to pay discriminatory and highly inflated fees.

5 So it's in -- I think -- you know, we've already  
6 briefed this issue. I'm not going to spend more time on it.  
7 But it appears to me to be within the four corners of the act.

8 THE COURT: Okay. Thank you, Counsel. I appreciate  
9 the dialogue back and forth.

10 Here is my ruling: The motion for a TR0 is granted.  
11 It is pretty obvious to me that there is a live issue. The  
12 town has an ordinance on the books. The meter is running at  
13 the higher rate as of end of October, October 26th, give or  
14 take. And the village -- excuse me -- the town is intending  
15 to collect on that, including both a higher rate and late fees  
16 and has not taken off the table the possibility of using more  
17 coercive steps for getting that money. So it seems pretty  
18 clear to me that there is a live dispute between the parties.

19 I find that all of the requirements for a TR0 are  
20 satisfied. There is a likelihood of success on the merits,  
21 irreparable harm, inadequate remedy at law, plus a public  
22 interest at play here.

23 The likelihood of success on the merits, the  
24 ordinance on its face is facially discriminatory against the  
25 railways -- the railroad, rather. It expressly targets a

1 railroad and increases a fee for a railroad. So it seems  
2 pretty obviously targeted to a railroad. And that's something  
3 that they're not allowed to do, as I understand it, under the  
4 statute.

5           It sure seems to me, based on what I know now -- and  
6 that's an important caveat -- based on what I know now, that  
7 the town is attempting to hold the railroad hostage. They  
8 want their pound of flesh from the railroad to close a  
9 shortfall in their budget, and they are doing so through an  
10 increase that does not appear to be tied to actual usage; it,  
11 rather, seems to be a tax targeted at a railroad in  
12 particular.

13           The interstate railway system in this country cannot  
14 operate if every municipality along the way gets their pound  
15 of flesh, and it sure seems to me that that is what the town  
16 is attempting to do here. I see that there is a likelihood of  
17 success for the merits. Irreparable harm comes into play here  
18 because I am not convinced at all that there is an adequate  
19 remedy for getting the money back. And if they had to shut  
20 down, you know, that's going to harm their customers, their  
21 network, and their ability to move product from place to  
22 place. That's never a good thing when you're dealing with an  
23 interstate railway system. It's especially not a good thing  
24 now, especially not a good thing now in the pandemic in  
25 Chicago.

1           So I find that there is a likelihood of success on  
2 the merits, irreparable harm, no adequate remedy. I also  
3 think that there are strong equitable interests of the public  
4 at play. You've got a lot of people working in that rail  
5 yard. A lot of people depend on it: customers, suppliers,  
6 shippers, distributors. A lot of people need the goods, and  
7 the town here I think has frankly gotten over their skis,  
8 gotten overtly threatening to the railroad. It seems a bit  
9 over the top to say you're going to go in there and shut off  
10 the water, tear up the pipes and shut them down. It really  
11 seems like you're trying to hold the railway -- railroad  
12 hostage.

13           That's how I see it as things stand here. This is  
14 simply a temporary restraining order. It is not a preliminary  
15 injunction. So I want to talk to you about next steps. I  
16 want to know from you folks what your preferred battle plan  
17 would be for a motion for a preliminary injunction. Did you  
18 need additional discovery? Do you want an evidentiary  
19 hearing? Do you want to file additional briefs? And if so,  
20 when?

21           So, Mr. Mariotti, I'll -- and I'll say on this, if  
22 you want to think it over, talk it over and propose something  
23 to me on Friday, you certainly can. Maybe that's what we  
24 ought to do. You know, maybe you can take it back to your  
25 clients and talk with each other. But why don't you folks

1 give me your reaction to each of those points.

2 Do you think you need additional discovery? Do you  
3 think you want an evidentiary hearing? And what would the  
4 timing look like if you want to have a hearing and want  
5 additional briefs? Mr. Mariotti?

6 MR. MARIOTTI: We have already briefed this issue.  
7 You already have existing papers on the preliminary injunction  
8 previously before the stipulation was entered. And at this  
9 point we're almost done with motion for summary judgment  
10 briefing, so our view would be just to go forward on the  
11 papers that have already been filed.

12 THE COURT: All right. Is everything in the record  
13 from your standpoint of -- from the depositions that I  
14 authorized?

15 MR. MARIOTTI: Yes, we've already -- we already  
16 submitted to you selections from those depositions and put the  
17 facts in front of you.

18 THE COURT: I just want to make sure there's nothing  
19 else out there.

20 How about from your standpoint, Ms. Grandfield?

21 Ms. Grandfield, are you there?

22 Mr. Mariotti, are you still there?

23 MR. MARIOTTI: I am.

24 MS. GRANDFIELD: I'm sorry. I'm sorry. I hit the  
25 mute button. I'm sorry. Classic --

1 THE COURT: That's okay.

2 MS. GRANDFIELD: -- teleconference. I'm here.

3 Sorry.

4 THE COURT: Okay.

5 MS. GRANDFIELD: So -- so I would like to supplement  
6 my response to the motion for preliminary injunction with  
7 the -- some of the arguments that I made in my, you know,  
8 motion to dismiss, or I can just incorporate those somehow,  
9 whatever is easiest and most efficient for the parties,  
10 because I don't want to get into some weird like surresponse  
11 or surreply.

12 I will say just most simply, I was under a lot of  
13 time pressure in the previous briefs, and I feel like I  
14 made -- and maybe I didn't, maybe it was confusing, but I feel  
15 like I made a better argument in my motion to dismiss with  
16 respect to the ICCTA and the 4-R Act than I made in my  
17 response brief because I just -- you know, I was under time  
18 constraints.

19 THE COURT: That's fine. It sounds like you've  
20 already got it in the can. Can you do it by a week from  
21 Friday?

22 MS. GRANDFIELD: Yes.

23 THE COURT: So today is the 10th. So that's going to  
24 be the 19th, if I ballpark it.

25 MS. GRANDFIELD: Yes.



1           THE COURT: And then, Mr. Mariotti, I don't know if  
2 you are going to want a chance to respond to that. Maybe you  
3 folks feel like you've shot your wad already and then some.

4           I guess the other thing I care to know is, does  
5 anyone want an evidentiary hearing, or do you want me to just  
6 rule on the papers?

7           MR. MARIOTTI: I think we can go based on the papers,  
8 Your Honor. And, I mean, this has already been fully briefed.  
9 We could even do an argument on the motion to dismiss and PI  
10 together if -- if counsel is -- you know, thinks that that  
11 would -- the argument --

12           MS. GRANDFIELD: And I would say I don't want to  
13 burden the Court, but I am fine with -- and actually that's  
14 why -- I agree. I am fine with that. Because I don't want to  
15 be -- you know, I don't want to be briefing something over and  
16 over again that the Court has already said no to.

17           You know, so if we go ahead and decide this -- decide  
18 that as well, then we can just decide it together. And then,  
19 you know, to the extent I need to put it in my response to  
20 summary judgment just to preserve the argument, then I will,  
21 but we don't have to keep going --

22           THE COURT: Okay.

23           MS. GRANDFIELD: -- through this over and over --

24           THE COURT: Yep.

25           MS. GRANDFIELD: -- again.

1 THE COURT: Got it. Okay. Thank you. That's  
2 helpful.

3 So here's the battle plan: Go ahead, Ms. Grandfield,  
4 get your supplemental submission on file by a week from  
5 Friday, the 19th. I will then take everything under  
6 advisement. I have interests at play here that may or may not  
7 be the same as the parties. It is possible that I'm going to  
8 want a hearing, either argument or testimony. I think it's  
9 probably unlikely that I'll want to hear testimony. But any  
10 injunction request that comes to me, it's up to me to decide  
11 what to -- what I need before deciding it.

12 So my presumption will be that I'm going to do it on  
13 the papers alone, but stay tuned on that. Okay. So I -- it's  
14 a long way of saying, I'm inclined to agree with you, but if  
15 I'm seeing factual holes that I think need to be filled, I'll  
16 make sure that you know that, and we'll fill them. Okay?

17 So the motion for a TRO is granted. I'll go ahead  
18 and get a minute order out. I'll get a TRO out, and we'll  
19 take it from there.

20 Mr. Mariotti, anything else that you want to cover  
21 today?

22 MR. MARIOTTI: No, Your Honor. Thank you.

23 THE COURT: I guess one last question to you,  
24 Mr. Mariotti, do we have a draft TRO order in our proposed  
25 order inbox, I assume?

1           MR. MARIOTTI: I believe so, but we can -- we'll take  
2 a look, and we can -- I believe that that -- I believe so, and  
3 I believe it's still up to date, but I'll take a close look.  
4 If it isn't, I'll send an updated one.

5           THE COURT: Okay. Sounds good.

6           Ms. Grandfield, anything that you want to raise?

7           MS. GRANDFIELD: I had a few points of clarification  
8 based on my notes.

9           You had earlier said that you wanted me to file some  
10 sort of declaration by Friday as to what the -- BNSF was  
11 paying if they were paying that 6600. Would you still like me  
12 to do that?

13          THE COURT: Yeah, I'd still like you to do it. And  
14 it doesn't have to be a declaration in the standpoint it  
15 doesn't have to be a statement under penalty of perjury. I  
16 didn't mean it like that. I just want -- I want the parties  
17 to file something jointly, probably a sentence or two will  
18 suffice, that says BNSF is or is not paying money and the  
19 money is X dollars.

20          MS. GRANDFIELD: Okay. Would there be -- I'm  
21 actually -- so I'm going out of town with my two best friends  
22 for the first time in two years, and I'm going to be out of  
23 the office on Friday. Would there be any way that we could  
24 file --

25          THE COURT: No worries.

1 MS. GRANDFIELD: -- this on Monday?

2 THE COURT: How about Wednesday of next week?

3 MS. GRANDFIELD: Yeah, that would be great. Okay.

4 And then -- does that work okay for you, Mr. Mariotti? I  
5 should have asked.

6 MR. MARIOTTI: Wednesday of next week works fine for  
7 me.

8 MS. GRANDFIELD: Okay. And then the last follow-up  
9 question, I hope. With respect to this TRO, does this mean  
10 the new ordinance only in that the town can still collect its  
11 previous rate of 6600 a month?

12 THE COURT: Yeah, I will tell you, I was inclined to  
13 rule that you cannot do the increase, the proposed increase.  
14 I was not planning on giving anybody a license for free sewer  
15 stuff.

16 Mr. Mariotti, any reason why I'm wrong about that?

17 MR. MARIOTTI: Nope. In fact, I -- it was my  
18 understanding, and still is, that we have been paying and we  
19 believe we should continue to pay that 6600 a month.

20 THE COURT: That's right. So it's not a  
21 get-sewer-free card I'm issuing here today, Ms. Grandfield;  
22 it's simply a bar -- a temporary bar against applying the rate  
23 increase and associated penalties and enforcement mechanisms.

24 MS. GRANDFIELD: Okay. I just wanted to make sure so  
25 I could accurately convey that to the town water and sewer

1 department. Thank you.

2 THE COURT: Okay, folks. Thank you for your time and  
3 attention today. And, again, thank you for bearing with me on  
4 the late start. I knew when I put you in today that it was  
5 going to be a tight squeeze, but I try to give good customer  
6 service and get people in here when they tell me that there's  
7 a TRO and they need to get in here. And the downside of that  
8 is, sometimes it's hard to squeeze everybody in.

9 So thank you for your professionalism on the late  
10 start today. But we'll go ahead and get the stuff on file and  
11 look forward to getting your submission next week,  
12 Ms. Grandfield. Okay?

13 MS. GRANDFIELD: Thank you, Your Honor.

14 THE COURT: Thank you, folks. We're adjourned. Take  
15 care now.

16 MS. GRANDFIELD: Okay. Bye.

17 (Which were all the proceedings heard.)  
18  
19  
20  
21  
22  
23  
24  
25

\* \* \* \* \*

C E R T I F I C A T E

I certify that the foregoing is a correct transcript, to the extent possible, of the record of proceedings in the above-entitled matter, given the limitations of conducting proceedings via telephone.

*/s/ Amy M. Spee*

*11/15/2021*

AMY M. SPEE, CSR, RPR, CRR  
Official Court Reporter

Date